

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RAYMOND O'DONNELL,

Defendant-Appellee.

UNPUBLISHED

May 25, 1999

No. 213314

Oakland Circuit Court

LC No. 98-158730 FH

Before: Griffin, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the sentence of four to fifteen years in prison following defendant's plea-based conviction of criminal sexual conduct in the third degree, MCL 750.520d; MSA 28.788(4). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded *nolo contendere* to one count of criminal sexual conduct in the third degree, a felony carrying a maximum penalty of fifteen years in prison, and one count of criminal sexual conduct in the fourth degree, MCL 750.520e; MSA 28.788(5), a misdemeanor carrying a maximum penalty of two years in prison. The offenses occurred in 1992. The victim was his daughter. Defendant entered the plea pursuant to an understanding that his minimum term for the felony offense would not exceed five years. *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

The sentencing guidelines as scored by the probation department recommended a minimum sentence range of thirty to seventy-two months. The presentence information report recommended a minimum term of three years for the felony offense. At the sentencing hearing, both the prosecutor and the probation department representative indicated that the guidelines should have been scored at 60 to 120 months. The court rejected arguments from both the prosecutor and defendant regarding the scoring of the guidelines and indicated that they would remain scored at thirty to seventy-two months, as originally calculated by the probation department. The court sentenced defendant to concurrent terms of four to fifteen years for the conviction of criminal sexual conduct in the third degree and one to two years for the conviction of criminal sexual conduct in the fourth degree, with credit for one day.

Sentence length is reviewed pursuant to the principle of proportionality. A sentence must be “proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). *Milbourn* applies to sentences that fall below the guidelines as well as to those that exceed the guidelines. *People v Lankey (After Remand)*, 198 Mich App 187, 188; 497 NW2d 571 (1993).

Plaintiff argues that the misscoring of the guidelines resulted in the imposition of a disproportionately lenient minimum term for the offense of criminal sexual conduct in the third degree. We disagree and affirm. Defendant’s plea agreement provided for the imposition of a minimum term not to exceed five years. Had the court imposed a minimum term exceeding five years, defendant would have had an absolute right to withdraw the plea. *Cobbs, supra* at 283.

Appellate review of challenges to the sentencing guidelines is limited. Application of the guidelines presents a cognizable claim only if (1) a factual predicate is wholly unsupported; (2) a factual predicate is materially false; and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). If the sentence is proportionate, an error in the calculation of the guidelines provides no basis for relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). The key test of the proportionality of a sentence is whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Plaintiff has not stated a cognizable claim for review. Because the four-year minimum term for the offense of criminal sexual conduct in the third degree was within the guidelines range of thirty to seventy-two months adopted by the court, it is presumed to be proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). However, even assuming that the guidelines range adopted by the court was incorrect, plaintiff is not entitled to relief because the minimum term of four years is not disproportionate. Defendant had no prior record, had a steady employment history, and complied with all conditions of bond. He did not deny that the offenses had occurred and did not attempt to discount the seriousness of the offenses. The court explained the sentence it imposed and stated that it considered the sentence to be an appropriate exercise of its discretion. Under such circumstances, the validity of the guidelines scoring is a moot issue. *People v Phillips (After Second Remand)*, 227 Mich App 28, 38; 575 NW2d 784 (1997). The minimum sentence of four years does not fall short of what any reasonable person would consider to be an appropriate response to defendant and to the offenses he committed. *People v Coles*, 417 Mich 523, 543; 339 NW2d 440 (1983), overruled in part on other grounds in *People v Milbourn, supra* at 635. Because the sentence is not disproportionate, plaintiff is not entitled to relief. *Raby, supra*.

Affirmed.

/s/ Richard Allen Griffin

/s/ Mark J. Cavanagh

/s/ E. Thomas Fitzgerald